

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	I.D. # 0006015793
)	
JAMES A. MAYS,)	
)	
Defendant)	
)	

Submitted: July 18, 2006
Decided: August 28, 2006

Upon Defendant's Motion for Postconviction Relief.
DENIED IN PART; SUMMARILY DISMISSED IN PART.

ORDER

Marsha J. White, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

James A. Mays, Smyrna, Delaware, *pro se*.

COOCH, J.

This 28th day of August, 2006, upon consideration of Defendant's
motion for postconviction relief, it appears to the Court that:

1. James A. Mays ("Defendant") was arrested on September 5, 1992,
and was indicted on July 31, 2000 on the charges of Attempted Murder First
Degree, Robbery First Degree, Possession of a Firearm During the

Commission of a Felony (2 counts) and Conspiracy Second Degree. Defendant was also initially charged with Assault First Degree and Conspiracy First Degree, but were subsequently nolle prossed. Another charge of Possession of a Firearm By a Person Prohibited was severed. After a trial, which began on February 28, 2002, and ended on March 11, 2002, the jury convicted Defendant on the charges of Attempted Murder First Degree, Robbery First Degree, Possession of a Firearm During the Commission of a Felony (two counts), and Conspiracy Second Degree. During trial, on March 6, 2002, Defendant, for the first time, moved to suppress his own statement. The Court denied that motion.¹ Then, on June 14, 2002, Defendant was sentenced to the following: (1) for Attempted Murder First Degree, 15 years at Level V; (2) for Robbery First Degree, 10 years at Level V, suspended after 5 years for 5 years at Level IV, followed by decreasing levels of supervision; (3) for both counts of Possession of a Firearm During the Commission of a Felony, 10 years at Level V, suspended after 5 years for 5 years at Level II; and (4) for Conspiracy Second Degree, 1 year at Level V, suspended immediately for 1 year at Level II. In all, Defendant was sentenced to 30 years at Level V incarceration. Defendant appealed to the Delaware Supreme Court based on two grounds: (1) that the

¹ *Mays v. State*, Del. Super., ID No. 0006015793, D.I. 26, Cooch, J. (March 8, 2002) (ORDER).

trial court erred in admitting certain photo arrays and identifications into evidence, and (2) that the trial court erred in denying Defendant's motion to suppress, raised for the first time at trial, a statement Defendant made to police. The Supreme Court affirmed.²

2. Defendant filed this timely motion for postconviction relief pursuant to Superior Court Criminal Rule 61 on June 13, 2005. Defendant sets forth, in the form motion for postconviction relief, the following eight claims in support of his motion: (1) that there was no evidence put forth by the State as to specific intent or premeditation; (2) that defense counsel failed to object on hearsay grounds to audiotapes of witnesses played in court during the trial; (3) that defense counsel was ineffective for failing to object to the admission of photographic identifications; (4) that defense counsel failed to object to the introduction of medical records into evidence at trial; (5) that defense counsel failed to "object to a misleading question by the prosecutor during direct examination;"³ (6) that defense counsel was ineffective for failing to raise the March 6, 2002, Motion to Suppress before trial; (7) that

² *Mays v. State*, 2003 WL 231615 (Del. Supr.) (holding (1) that the trial court did not abuse its discretion by admitting the photo arrays, which were held not to be suggestive, (2) that it was not plain error for trial court to admit a photo line-up where the police procedures used were "unnecessarily suggestive" as it was not ultimately prejudicial to defendant, and (3) that in addition to properly denying the motion as untimely, it was not reversible error for the trial court to deny the motion on the ground that defendant had not requested an attorney).

³ Def.'s Mot. for Postconviction Relief 3.

defense counsel was ineffective for failing to “adequately prepare for trial because he did not have adequate time to meet with defendant,”⁴ and (8) that defense counsel was ineffective for failing to move for portions of Defendant’s criminal record to be redacted.

3. In response, Defendant’s trial counsel, David J. J. Facciolo, Esquire, filed an affidavit, pursuant to Super. Ct. Crim. R. 61(g)(2), in order to respond to Defendant’s allegations of ineffective assistance of counsel. Defense counsel responded to Defendant’s allegations as they were set forth in Defendant’s memorandum in support of his motion for postconviction relief, thus, the arguments are not in the same order as above. First, as to Defendant’s argument that defense counsel was ineffective in not raising the motion to suppress Defendant’s statement to the police prior to trial, counsel contends that he raised the issue upon first learning of it, even though that happened to be during the trial.⁵ Second, counsel asserts that he objected to the allegedly suggestive photo identifications at trial, which, he argues, was appropriate.⁶ Third, as to Defendant’s assertion that trial counsel failed to raise sufficiency of evidence objections at trial, counsel argues that this

⁴ *Id.* at 4.

⁵ Facciolo Aff. 3, ¶ 1.

⁶ *Id.* at 5, ¶ 3.

“issue is contradicted by the record.”⁷ Fourth, as to the allegation that trial counsel failed to object to the introduction of Defendant’s medical records, counsel argues that such an objection would have been frivolous and would have been bad trial practice.⁸ Fifth, as to Defendant’s allegation that counsel ineffectively failed to object to the admission of audiotapes, counsel again argues that such an objection would have been frivolous and would have been bad trial practice.⁹ Finally, as to Defendant’s assertion that trial counsel should have objected to the introduction of Defendant’s unredacted statement to the police into evidence, counsel asserts that this was sound trial practice.¹⁰

4. The State also responded to Defendant’s motion. The State’s respective arguments are: (1) that ground one should be procedurally barred as it was not previously asserted in Defendant’s direct appeal and Defendant has not shown cause or prejudice to have it heard now;¹¹ (2) that ground two should be denied as trial counsel’s failure to object to the audiotapes did not

⁷ *Id.* at 5, ¶ 1.

⁸ *Id.* at 5-6, ¶¶ 2, 3

⁹ *Id.* at 6, ¶¶ 2, 3.

¹⁰ *Id.* at ¶ 1.

¹¹ State’s Resp. 2.

fall below an objective standard of reasonableness;¹² (3) that ground three should be denied as the Delaware Supreme Court has already ruled that the use of a photo line-up at trial, although suggestive, was not prejudicial;¹³ (4) that ground four, failure to object to the admission of medical records, should be summarily dismissed as conclusory;¹⁴ (5) that ground five, failure to object to a misleading question, should be summarily dismissed as conclusory;¹⁵ (6) that ground six, failure to file pre-trial motions in connection with Defendant's statement to the police, should be denied as Defendant was not prejudiced;¹⁶ (7) that ground seven, failure to adequately prepare for trial, should be summarily dismissed;¹⁷ and (8) that ground eight, failure of trial counsel to redact Defendant's prior criminal record from statement is conclusory.¹⁸

5. Upon review of Defendant's motion, all of the above grounds are 1) unsupported by any facts, 2) conclusory or 3) were not raised in a direct

¹² *Id.* at 5.

¹³ *Id.* at 3.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5-6.

appeal, and, thus, procedurally barred. Therefore, the motion is **DENIED IN PART** and **SUMMARILY DISMISSED IN PART**.

6. When considering a motion for postconviction relief, the Court must first apply the procedural bars of Super. Ct. Crim. R. 61.¹⁹ If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.²⁰ Rule 61(i)(3) provides that “[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, [or] in an appeal ... is thereafter barred, unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant’s rights.” The procedural bar of Rule 61(i)(3) can potentially be overcome by Rule 61(i)(5), which provides that “[t]he bar[] to relief in paragraph[] ... (3) ... shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.” This “fundamental fairness” exception contained in Rule 61(i)(5) is “a narrow one and has been applied only in limited circumstances,

¹⁹ *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990)(citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

²⁰ *Saunders v. State*, 1995 WL 24888 (Del. Supr.); *Hicks v. State*, 1992 WL 115178 (Del. Supr.); *State v. Gattis*, 1995 WL 790961 (Del. Super.) (citing *Younger v. State*, 580 A.2d at 554).

such as when the right relied upon has been recognized for the first time after [a] direct appeal.”²¹ However, although Rule 61(i)(3), as well as Rule 61(i)(4), could arguably apply here to bar Defendant’s claim, the procedural bars of Rule 61 do not apply to a claim of ineffective assistance of counsel as it is a “constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceeding.”²²

7. To succeed on an ineffective assistance of counsel claim, Defendant must show both (a) that “counsel’s representation fell below an objective standard of reasonableness” and (b) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would be different.”²³ Defendant must satisfy the proof requirements of both prongs in order to succeed on an ineffective assistance of counsel claim; failure to do so as to one prong will render the claim unsuccessful and the court need not address the remaining prong. Defendant must prove his allegations by a preponderance of the evidence.²⁴ Moreover, allegations that

²¹ *Younger*, 580 A.2d at 555.

²² Super. Ct. Crim. R. 61(i)(5). *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating that proof an ineffective assistance of counsel claim “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”).

²³ *Albury v. State*, 551 A.2d 53, 58 (Del. 1998) (quoting *Strickland*, 466 U.S. at 688, 694).

²⁴ *State v. Wright*, 653 A.2d 288, 294 (Del. Super. Ct. 1994).

are entirely conclusory are legally insufficient to prove ineffective assistance of counsel; the defendant must allege concrete allegations of actual prejudice and substantiate them.²⁵ Finally, any “review of counsel’s representation is subject to a strong presumption that the representation was professionally reasonable.”²⁶

8. Finally, Superior Court Criminal Rule 61(d)(4) provides that “[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in this case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified.” Defendant’s motion for postconviction relief will be summarily dismissed where no facts supporting Defendant’s contentions are offered and the claims are conclusory.²⁷

9. As to ground one, this Court finds that it is procedurally barred under Rule 61(i)(3). Defendant’s claim that the State did not sufficiently prove specific intent or premeditation on the part of Defendant was not raised in

²⁵ *Jordan v. State*, 1994 WL 466142 (Del. Supr.) (citing *Younger v. State*, 580 A.2d at 556) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel); *State v. Brittingham*, 1994 WL 750341 (Del. Super.) (same).

²⁶ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

²⁷ *State v. Cooper*, 2001 WL 1729147 (Del. Super.) (summarily dismissing defendant’s claims of false testimony and ineffective assistance of counsel as defendant did not offer supporting facts and the claims were conclusory). *See also Jordan v. State*, 1994 WL 466142 (Del. Supr.); *State v. Brittingham*, 1994 WL 750341, * 2 (Del. Super.) (citing *Younger v. State*, 580 A.2d at 556 (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel)).

either the initial trial or on direct appeal. Thus, under Rule 61(i)(3)(A) and (B), Defendant may only succeed on this ground if he can satisfy both the “cause” and “prejudice” prongs. Although Defendant submitted a reply brief specifically addressing both of those prongs, it did so in a conclusory fashion. For example, as to the “prejudice” prong, Defendant merely alleges that “[t]rial counsel failed to address issues of constitutional importance and failed to make objections during trial, sentencing and direct appeal.”²⁸ As a Defendant must show a “substantial likelihood” that the outcome would have been different had the issue been raised before, such conclusory allegations of prejudice are not enough to satisfy the “prejudice” prong.²⁹ As the “prejudice” prong was not satisfied, this Court need not address the “cause” prong.³⁰ Further, Defendant has not sufficiently pointed to a constitutional violation that has “undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”³¹ Therefore, Defendant’s first ground for relief is **DENIED**.

10. Defendant’s second ground, that trial counsel failed to object on hearsay grounds to the playing of audiotapes of witnesses during trial, fails

²⁸ Def.’s Reply 2.

²⁹ See *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

³⁰ See *Grosvenor v. State*, 849 A.2d 33, 35 (Del. 2004).

³¹ Super. Ct. Crim. R. 61(i)(5).

as Defendant has not shown through concrete facts from the record that trial counsel's actions fell below an objective level of reasonableness. Both trial counsel and the State agree that the tapes were admissible and that any such hearsay objection would have been frivolous.³² As trial counsel undoubtedly knew the applicable rule of evidence and that such an objection would be frivolous, the decision to not object is sound trial strategy and does not fall below any standard of reasonableness. Thus, Defendant's second ground for relief is **DENIED**.

11. Defendant's third claim, that trial counsel should have moved to suppress a suggestive photo line-up prior to trial, also fails. The Delaware Supreme Court, in the direct appeal of Defendant's convictions, held that while the photographic line-up was not itself suggestive, the "procedures used by the police officers in having the witnesses identify [the Defendant] were impermissibly suggestive."³³ However, the Court went on to say that although the procedures used with one witness was suggestive, no prejudice resulted.³⁴ Therefore, as no prejudice existed, the outcome would not have been different, and Defendant has not shown that trial counsel's failure to object caused Defendant any prejudice. Thus, ground three is **DENIED**.

³² Facciolo Aff. at 6, ¶ 1-3; State's Resp. 5.

³³ *Mays v. State*, 2003 WL 231615, at * 2.

³⁴ *Id.* at * 4.

12. As to ground four of Defendant’s motion, that trial counsel was ineffective by not objecting to the stipulated introduction of medical records, Defendant has only supplied this Court with conclusory allegations of prejudice. The Defendant merely states that “with the admission of the medical records, the jury is undoubtedly heightened as to the severity of the victim’s injury beyond the live testimony and without the necessity of satisfying the intent issue.”³⁵ The Defendant has not set forth any concrete allegations of actual prejudice nor has he been able to substantiate them.³⁶ Thus, ground four of Defendant’s petition is completely conclusory and is **SUMMARILY DISMISSED.**

13. Ground five of Defendant’s motion claims that trial counsel was ineffective by failing to object to misleading questions posed by the State. This claim is also conclusory as it points to no concrete facts in the record to substantiate the claim. Thus, under Rule 61(d)(4), ground five of Defendant’s petition is **SUMMARILY DISMISSED.**

14. Ground six of Defendant’s motion is also conclusory. Defendant claims that “introduction of the defendant’s unredacted statement in the presence of the jury could have lead them to speculate that the police inquiry

³⁵ Def.’s Memorandum in Supp. of Pet. 7.

³⁶ *Jordan v. State*, 1994 WL 466142 (Del. Supr.) (citing *Younger v. State*, 580 A.2d at 556) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel); *State v. Brittingham*, 1994 WL 750341 (Del. Super.) (same).

was reasonable and that the defendant should fully cooperate if he ‘had nothing to hide.’”³⁷ The Delaware Supreme Court, in Defendant’s direct appeal, spoke at great length as to Defendant’s statement and the untimely motion to suppress. The Court held that although after Defendant had requested an attorney all questioning should have stopped, and that the statement that resulted from further questioning was admitted in error, there was no prejudice from such error “because the statement, although taken without the presence of counsel, was essentially exculpatory.”³⁸ Therefore, as the Delaware Supreme Court found that there was no prejudice, Defendant can not satisfy, and has not done satisfied, the prejudice prong of a claim of ineffective assistance of counsel. Thus, Defendant’s sixth ground for relief is **DENIED**.

15. Ground seven of Defendant’s petition focuses on Defendant’s claim that trial counsel did not adequately prepare for trial by meeting with Defendant. Defendant’s claim is completely conclusory as it does not set forth any concrete facts from the record in support of his allegation.³⁹ Thus, ground seven is **SUMMARILY DISMISSED**.

³⁷ Def.’s Memorandum in Supp. of Pet. 8.

³⁸ *Mays v. State*, 2003 WL 231615, at * 5.

16. Finally, ground eight of Defendant's petition alleges that trial counsel was ineffective for failing to redact Defendant's prior record from Defendant's statement. Defendant sets forth a conclusory allegation of ineffective assistance of counsel without any substantiating facts or case law. Thus, Defendant's allegation of ineffective assistance of counsel as it relates to redaction of Defendant's statement dealing with Defendant's prior criminal record is **SUMMARILY DISMISSED**.⁴⁰

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
David J. J. Facciolo, Esquire

³⁹ *Jordan v. State*, 1994 WL 466142 (Del. Supr.) (citing *Younger v. State*, 580 A.2d at 556) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel); *State v. Brittingham*, 1994 WL 750341 (Del. Super.) (same).

⁴⁰ *Id.*; *Id.*